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EU Anti-discrimination Law: Has the CJEU Stopped Moving Forward?

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Abstract:

This article analyses the protection which two EU Directives, adopted in 2000, provide against discrimination on the grounds of racial and ethnic origin, religion or belief, disability, age and sexual orientation. This protection is not the same for all these grounds and this has led to what is often referred to in the literature as a hierarchy of discrimination grounds. The article examines these differences in protection against discrimination and the reasons for them and includes an analysis of the influence of the case law of the CJEU on the development of this area of law. The argument in this article is that the CJEU has generally given a purposive and expansive interpretation to the provisions and has expanded the protection against discrimination in many cases, but three recent cases seem to form an exception to this. Possible reasons for this recent reticence are given.

Introduction

In 2000, the EU adopted two directives against discrimination: Directive 2000/43/EC,¹ prohibiting racial and ethnic origin discrimination, and Directive 2000/78/EC,² prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation. This was the first time the EU legislated against these grounds of discrimination, in contrast to the EU provisions for equal pay between men and women and measures against sex discrimination which have been in place much longer.³ This article will not discuss the protection provided against sex discrimination because its focus is on the novel grounds of discrimination introduced in EU law in 2000. It was held that the EU did not have the competence to act against discrimination on the wider grounds beyond sex discrimination, but this was remedied by the Treaty of Amsterdam which created this competence, resulting in the adoption of the above Directives in 2000. However, the protection is not the same

for all these grounds and this has led to what is often referred to as a hierarchy of discrimination grounds. This hierarchy and the possible reasons behind it are analysed. The Court of Justice of the European Union (CJEU) case law has been very influential on the development of this area of EU law and this forms part of the analysis. The argument is that the CJEU has generally given a purposive interpretation to the provisions and has expanded the protection against discrimination in many cases, but three recent cases – *Parris*,⁴ *Achbita*⁵ and *Bougnaoui*⁶ - seem to form an exception to this as the CJEU has given a rather more restricted interpretation of the Directives. The following addresses possible reasons for this as well as what this means for the hierarchy of discrimination grounds and, more generally, for the protection against discrimination provided by EU law, including the risks of not applying EU anti-discrimination law in a uniform way.

It must be noted that this article does not intend to give a complete overview of all case law of the CJEU under the two Directives. Rather, it focuses on analysing a number of cases in which the CJEU has clarified and extended the protection against discrimination and, in this way, has made the directives more effective tools to combat discrimination.

The article starts, part I, with an analysis of the hierarchy of discrimination grounds created by the two Directives. This is followed in part II, by an examination of a number of cases of the CJEU in which the Court has clarified concepts or in other ways has moved the protection provided forwards. Then, in part III, an analysis of the three recent cases in which the CJEU appears to have stopped going forwards by giving a restrictive interpretation is undertaken, including the possible reasons for this change in the Court's approach.

I Hierarchy of discrimination grounds

The 1997 Treaty of Amsterdam, in force in 1999, introduced Article 13 (now Article 19 Treaty on the Functioning of the European Union (TFEU)) into the EC treaty. This Article created the competence for the EU to adopt measures against discrimination on the grounds of racial and ethnic origin, religion or belief, disability, age and sexual orientation. In 2000, two Directives against discrimination

based on this Article were adopted: Directives 2000/43/EC and 2000/78/EC. Both Directive prohibit direct discrimination,⁷ indirect discrimination,⁸ harassment,⁹ victimisation¹⁰ and instruction to discriminate¹¹ and define these concepts in the same way.

But, the protection provided by these two Directives against discrimination is not the same for all grounds covered and this has led to a so-called hierarchy of discrimination grounds (Barry, 2003; Bell and Waddington 2003; Flynn, 1999; Howard, 2007; Schiek, 2002; Waddington and Bell 2001). This hierarchy is said to exist because Directive 2000/43/EC provides stronger protection against racial or ethnic origin discrimination than Directive 2000/78/EC provides for discrimination on the grounds of religion or belief, disability, age and sexual orientation. There are three reasons for this: first, Directive 2000/78/EC covers only the areas of employment and occupation (Article 3 Directive 2000/78/EC), while the scope of Directive 2000/43/EC is much wider and, apart from employment and occupation, also covers social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services that are available to the public, including housing (Article 3 Directive 2000/43/EC).

Second, Article 13 Directive 2000/43/EC imposes a duty on Member States to designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin, but there is no such duty in Directive 2000/78/EC, although, many EU countries have equality bodies which cover all grounds of discrimination prohibited by their national law (Chopin and Germaine, 2017, 108-114).

Third, under Directive 2000/43/EC, direct discrimination cannot be justified except in two explicitly specified circumstances given in the Directive (genuine and determining occupational requirements (Article 4) and positive action (Article 5)). Under Directive 2000/78/EC, direct discrimination can be justified for the same reasons (Articles 4(1) and 7, respectively), but other justifications are also provided for. There is an exception for churches and other organisations with an ethos based on religion or belief (Article 4(2)); reasonable accommodation must be made for people with a disability (Article 5); direct discrimination on the ground of age can be justified in a

number of situations (Article 6); and, Article 2(5) contains a general justification clause (Howard, 2007: 447-449; Watson, 2012, 1477-1478).

There is a Proposal from the European Commission from 2008 (COM (2008) 426) to extend the protection against discrimination on the grounds covered by Directive 2000/78/EC to all areas covered by Directive 2000/43/EC. This proposal also requires Member States to designate a body for these grounds of discrimination. So, if adopted, two of the differences mentioned above would be removed. The Commission stated, in the Communication accompanying this Proposal (COM (2008) 420: under 2.2) that 'when it comes to protection against discrimination there can be no hierarchy' and that the proposed Directive, once adopted, 'will bring to an end any perception of a hierarchy of protection'. But it also considered that 'the various grounds of discrimination differ substantively, and each demands a tailored response. This is not a question of creating a hierarchy between the various grounds, but of delivering the most appropriate form of protection for each of them' (COM (2008) 420: under 2.2).

However, as Watson (2012: 1479) writes, this proposal 'will not bring the protection for victims of discrimination on the grounds of religion or belief, disability, age and sexual orientation on all fours with victims of racial or ethnic origin discrimination' and, because the scope is narrower, 'inequalities between victims of discrimination may continue'. The proposed Directive would thus still leave some differences. However, this is a moot point, as the proposal has not been adopted yet as the unanimity which is required has not been reached so far. Bell (2011: 620) writes that 'it seems that many Member States are reluctant to accept the broad-brush approach to material scope which was assumed in the rushed negotiation of the Racial Equality Directive [Directive 2000/43/EC]'.

Because of the differences in protection against discrimination on the different grounds, EU law is said to create a hierarchy of discrimination grounds with some receiving better protection than others. Based on the differences mentioned above, racial or ethnic origin discrimination should be placed at the top of this hierarchy of the grounds introduced in 2000 because of its wide material scope. Sex discrimination is prohibited in employment and occupation by Directive 2006/54/EC and,

in the access to and supply of goods and services by Directive 2004/113/EC, so the material scope is less wide than that of Directive 2000/43/EC. In this sense, sex as a discrimination ground can be placed just under racial and ethnic origin. On the other hand, it can be argued that sex discrimination should be placed at the top of the hierarchy, as it was prohibited in the EU from a much earlier date and as the protection has been developed further by the CJEU over the years since its introduction. Another reason to place sex discrimination at the top would be that Member States are also under a duty to designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of sex. However, irrespective of where sex discrimination is placed, of the grounds introduced in 2000, which are in the focus of this article, racial and ethnic origin is clearly at the top of the hierarchy.

Directive 2000/43/EC was adopted in record time, just over a year after the Community competence was established and within seven months of the proposal being published. Directive 2000/78/EC was adopted quite quickly as well, but still five months later than Directive 2000/43/EC. The wide coverage and quick adoption of the latter can be linked to the strong political will to do something about racial discrimination at the time which was influenced by the February 2000 elections in Austria, which resulted in Jorg Haider's Freedom Party, an extreme right-wing party, becoming part of the government. The other Member States protested against this and imposed bilateral diplomatic sanctions and Directive 2000/43/EC was then fast-tracked to signal the Union's and the Member States' commitment to combating racism (Bell, 2002: 74; Ellis, 2002, 293-294; Guild, 2000: 416; Howard, 2010, 22-23). There also seemed to be a favourable environment for anti-race discrimination law at the time: there was the planned EU enlargement and the wish to create a strong anti-discrimination *acquis* before the entrant states became members (Bell, 2002: 180; Ellis, 2002: 293-294). Race discrimination was also on the global agenda, with the preparations for the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which took place in 2001. Therefore, there was a strong political will to adopt a directive against racial discrimination (Howard, 2010: 22-23; Watson, 2012: 1459). And, although it might have been

political expediency, at least Directive 2000/43/EC has a wide coverage. If all grounds mentioned in Article 19 TFEU had been in one directive, then EU legislation against racial and ethnic origin discrimination might not have gone beyond the area of employment and occupation, given the problems with reaching consensus between the Member States about the proposal to extend the scope of Directive 2000/78/EC. Similar problems might also be behind the reticence of the CJEU in *Achbita* and *Bougnaoui*, the two cases concerning religion and belief discrimination, as will be discussed below.

In the hierarchy of discrimination grounds, age can be considered to be at the bottom because Article 6 Directive 2000/78/EC allows justification of direct age discrimination, while it does not allow for justification of direct discrimination on the other grounds (Waddington and Bell, 2001: 610). Because of this and because most of the CJEU case law on age discrimination concerns the justification of direct discrimination and is thus not always relevant for the other grounds of discrimination, age will not be discussed in the following.

But where do the other three grounds, religion or belief, disability and sexual orientation, fit in the hierarchy? It could be argued that disability should be at the top of these three grounds, because Article 5 Directive 2000/78/EC imposes a duty to make reasonable accommodation on employers of disabled employees unless this imposes a disproportionate burden on the employer. According to Article 5, 'this means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training'. There is no similar duty for other grounds of discrimination, although it has been suggested that such a duty could also be useful for other grounds (Council of Europe, 2011: para.6.1, point 2; Equinet, 2008: 8). The recent judgments of the CJEU on the wearing of the Muslim headscarf at work, *Achbita* and *Bougnaoui*, could suggest that religion or belief discrimination would come just above age discrimination and below disability and sexual orientation discrimination. The following section on the case law of the CJEU examines this.

II Case law of the CJEU: clarification and expansion

This part examines a number of cases of the CJEU and analyses whether the case law contributes to or enforces the hierarchy of discrimination grounds or whether it challenges it instead. The argument here is that the CJEU has generally given a purposive interpretation to the provisions of the 2000 Directives and has expanded the protection against discrimination in many cases, but that three recent cases seem to form an exception to this. Possible reasons for this recent reticence are given and the consequences for the hierarchy are discussed.

a Clarifying and expanding concepts

In a number of cases, the CJEU has clarified and expanded concepts which are common to both Directives. For example, in *CHEZ*,¹² the CJEU clarified the difference between direct and indirect discrimination: there is direct discrimination when the discrimination ground determines the decision for the less favourable treatment or, in other words, where the less favourable treatment is by reason of that ground; while indirect discrimination considers the effect of a measure, which is 'ostensibly' neutral or neutral 'at first glance' (*CHEZ*: para. 109).

In this same case, the CJEU also expanded the protection provided by the two Directives by making clear that discrimination by association is covered (*CHEZ*: para. 56). Discrimination by association occurs where someone is discriminated against because of their association with someone to whom a discrimination ground applies. The facts in *Coleman*¹³ illustrate what this means: the mother of a disabled son suffered detriment at work because she had to take time off to look after her son. The CJEU held that this was covered by disability discrimination under Directive 2000/78/EC because 'the principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1' (*Coleman*, para. 38).

In *Coleman*, there was direct discrimination and harassment by association but, in *CHEZ*, the CJEU held that indirect discrimination by association was also covered (*CHEZ*: para. 56). *Chez*

concerned a Bulgarian electricity company, which put up electricity meters in residential areas. These meters were generally put at a height of 1.7 metres, but, in neighbourhoods with predominantly Roma inhabitants, the meters were placed at a height of 6 to 7 metres. The reason given by the company was that this was to prevent tampering and unlawful connections to the electricity network. A shopkeeper in one of these Roma neighbourhoods, Ms Nikolova, who was herself not of Roma ethnic origin, complained that she had been discriminated against on the ground of racial or ethnic origin because she suffered the same disadvantage as her Roma neighbours.¹⁴ *Coleman* concerned Directive 2000/78/EC while *CHEZ* concerned Directive 2000/43/EC, but both directives define direct, indirect discrimination and harassment in the same terms, so the decisions apply to both Directives.

The reasoning in *Coleman* (para. 38), mentioned above, that the principle of equal treatment applies by reference to the grounds, would suggest that the Directives also prohibit ‘discrimination by perception’, discrimination because someone perceives a person to be, for example, of a particular ethnic origin or sexual orientation, when they are not, because such discrimination would be on the ground of racial or ethnic origin or sexual orientation (see also: Ellis and Watson, 2012: 146-147). Benedi Lahuerta (2016: 810-811) argues that ‘*CHEZ* suggest that the EU concept of discrimination by association *includes* [italics in original] discrimination by perception’.

Therefore, the CJEU has explained the meaning of direct and indirect discrimination and has accepted that both Directives cover direct and indirect discrimination and harassment by association and, as was argued, by perception.

b Racial and ethnic origin

Two important cases concerning the interpretation of Directive 2000/43/EC are analysed in this part. The first is *Feryn*,¹⁵ where one of the directors of a company installing garage and security doors, made a statement on local radio that, although the company was seeking to recruit new employees, they could not employ ‘immigrants’ because customers were reluctant to give them access to their private residences for the duration of the works. The CJEU held that such a statement concerning

candidates of a particular ethnic or racial origin constituted direct discrimination under Article 2(2)(a) Directive 2000/43/EC, because such a public declaration was clearly likely to dissuade some candidates from applying for jobs with this employer (*Feryn*, para. 25). The CJEU also made clear that, under EU law, a complaint can be made without there being an individually identified victim (*Feryn*, para. 25). There does not seem to be any reason why both these interpretations would not also apply to Directive 2000/78/EC.

Article 8(1) Directive 2000/43/EC and Article 10(1) Directive 2000/78/EC determine that the burden of proving discrimination shifts to the discriminating party once the person alleging discrimination has established facts from which it may be presumed that there has been discrimination. In *Feryn*, the CJEU held that statements made in public, like those made in this case, were enough for a presumption of the existence of a discriminatory employment policy, and that thus the burden of proof shifted to the employer who had to prove that its recruitment policy was not discriminatory (*Feryn*, paras 31-32). This is the same for Directive 2000/78/EC, as was held in *ACCEPT* (paras 53 and 62),¹⁶ a case concerning sexual orientation discrimination.

The second important case here is *CHEZ*, where the CJEU explained the concept of ethnicity: this concept has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds. The Court held that this applies to the Roma community (*Chez*, para. 46; Benedi Lahuerta, 2016: 805-807). This definition was repeated in *Jyske Finans A/S* (para. 17).¹⁷ However, in the latter case, the CJEU held that a difference in treatment based solely on a person's country of birth, which was not linked to any of the characteristics mentioned in the above definition, does not fall under the definition of ethnicity and thus does not breach Directive 2000/43/EC (*Jyske*, para. 20).

Therefore, the CJEU in these cases was willing to interpret the Directives broadly and to explain the rule on the shift in the burden of proof.

c Disability

The absence of a clear definition of disability in Directive 2000/78/EC has given rise to case law. Initially, the CJEU appeared to give a rather narrow interpretation of this term. In *Chacon Navas*,¹⁸ the claimant was off work because of sickness when she was dismissed. She claimed disability discrimination under Directive 2000/78/EC. The CJEU held that the concept of disability in the Directive, ‘must be understood as referring to a limitation that results in particular from physical, mental or psychological impairments and that hinders the participation of the person concerned in professional life’ (*Chacon Navas*, para 43). The Court went on to declare that disability was a term that differed from sickness and that implied that the impairment must last over a long period of time, and concluded that the Directive was not applicable as soon as a person developed a sickness (*Chacon Navas*, paras 44–46). Therefore, Ms Chacon Navas’ treatment did not fall under the Directive. The case was criticised for giving a rather restrictive interpretation of the term ‘disability’ (Hosking, 2007; Waddington, 2007; Watson, 2012: 1463).

However, since this case, the EU has signed and ratified the Convention on the Rights of Persons with Disabilities 2006 (CRPD)¹⁹ and, in *Ring and Werge* (para. 32),²⁰ the CJEU held that Directive 2000/78/EC must be interpreted in a manner consistent with this Convention. The CJEU gave a wide definition of disability which follows the definition in Article 1 CRPD: the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers; and, the impairment must be long-term (*Ring and Werge*, paras 38–39). The CJEU noted that a curable or incurable illness which resulted in the above limitation and which was long-term fell within the concept of ‘disability’ (*Ring and Werge*, para. 41). The Court also considered that an illness which is not long term and does not result in a limitation, would not constitute a disability; that a person with a disability who was only able to work part-time was capable of being covered by

the concept; and, that there was no condition that an individual required accommodation to be regarded as disabled (*Ring and Werge*, paras 42-45).

In *Ring and Werge*, the CJEU also clarified the concept of reasonable accommodation in Article 5 Directive 2000/78/EC and held that ‘such measures are intended to accommodate the needs of disabled persons. They are therefore the consequence, not the constituent element, of the concept of disability’ and that they do not apply unless there is a disability (*Ring and Werge*, para. 46). Referring to the CRPD, the CJEU also held that the concept of ‘reasonable accommodation’ must be defined widely and includes not only material but also organisational measures; and, that a reduction in working hours could be seen as a form of reasonable accommodation (*Ring and Werge*, paras 53-56 and 64).

Waddington writes that the definition in *Chacon Navas* was criticised for being based on the medical model of disability, while the *Ring and Werge* judgment can be seen as embracing the social model of disability which is reflected in the CRPD and ‘which argues that disability stems primarily from the failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment’ as the medical model does (Waddington, 2013: 18-19; see also: Betsch, 2013). The CJEU’s explanation of the reasonable accommodation measures also fits better within the social model of disability. The judgment, therefore, improves the protection provided against disability discrimination and, in doing so, establishes discrimination just below racial and ethnic origin in the hierarchy of discrimination grounds.²¹

d Sexual orientation discrimination and same sex partnerships

In a number of cases concerning sexual orientation discrimination,²² the CJEU has established that the Member States remain free to decide whether or not to institute and recognise same-sex partnerships in their national law; but, once the national law does recognise such relationships as comparable to that of spouses, then the principle of equal treatment on the ground of sexual orientation in Directive 2000/78/EC applies and, if registered same-sex partners are treated

differently from opposite-sex married partners, then this will constitute direct sexual orientation discrimination. So, if married opposite-sex partners and registered same-sex partners are in a comparable situation they must be treated the same way. It is up to the national courts to decide on whether their situations are comparable.

This can be seen as moving the protection against sexual orientation discrimination forward. However, the CJEU does not push for the Member States to introduce any form of legal recognition of same sex relationships. The reason for this might be found in Recital 22, Preamble, Directive 2000/78/EC, which the CJEU refers to and which determines that ‘this Directive is without prejudice to national laws on marital status and the benefits dependent thereon’. The Commission’s proposal extending the protection provided beyond employment (COM (2008) 426), follows the same line and explicitly states that it remains for Member States alone to decide whether to recognise same-sex marriages (COM (2008) 426, under 2 and 3).

However, the CJEU might soon have to clarify this position in relation to the free movement provisions in EU law in *Coman*.²³ Mr Coman, a Romanian, married his American male partner in Belgium in 2010. The Romanian authorities told him that a residence permit for his spouse would be refused because the Romanian Civil Code bans the recognition of same-sex marriages performed abroad. If Mr Coman’s spouse had been a woman, she would have been entitled to a residence permit. Mr Coman claimed that the failure to recognise his marriage breached his free movement rights and constituted sexual orientation discrimination, contrary to the EU Charter of Fundamental Rights (EUCFR). One of the questions referred to the CJEU concerned whether the word ‘spouse’ in Directive 2004/38/EC²⁴ includes same-sex partners. Advocate General Wathelet expressed the opinion that the term ‘spouse’ in this Directive should equally apply to same-sex and opposite-sex marriages.²⁵

If the CJEU follows this, it does not mean that all Member States have to provide for legal recognition of same-sex relationships in their national legislation, but it would mean that they would have to recognise a same-sex marriage validly contracted in another Member State in situations

which fall within the scope of EU Law (Cranmer, 2018: MacMahon Baldwin, 2018: Tryfonidou, 2017). Cranmer (2018) concludes that Advocate General Wathelet's opinion, together with developments in the US and in the European Court of Human Rights 'would suggest that there is a growing international legal consensus that same-sex couples have equal rights with opposite-sex couples'. MacMahon Baldwin (2018) suggests that, in *Coman*, there will be a debate in the CJEU about 'what level of Member State consensus [sic] is required to trigger a dynamic interpretation based on present day conditions'. However, he continues that 'although there is indeed a real trend in favour of complete equality by way of recognizing same-sex marriage, half of the Member States still do not allow for it'. MacMahon Baldwin (2018) concludes that 'critical members of the CJEU will be questioning whether the Advocate General's opinion is simply *reacting* to a change in society or rather seeking to *drive* it by imposing a development in Western Europe upon the rest of the Union' [italics in original]. The CJEU could, by following the opinion of the Advocate General, make a big step forward in protecting same sex couples against sexual orientation discrimination and it is hoped that it will do so. If it does not, then a mixed picture emerges in relation to sexual orientation discrimination: it can then be said that some steps have been made to expand this protection, but that the *Coman* judgment limits it. Not following the Advocate General's opinion would place sexual orientation as a discrimination ground below racial and ethnic origin and disability discrimination.

III Case Law of the CJEU: Limitations on the scope of protection

Many of the cases analysed so far have explained and enhanced the scope of the protection against discrimination provided by Directives 2000/43/EC and 2000/78/EC and the *Coman* case offers the CJEU an opportunity to give a similar expansive interpretation to the protection against sexual orientation discrimination. Overall, it can be concluded from the above that the CJEU has shown a willingness to interpret the Directives in a purposive and expansive way. However, as the following section illustrates, three recent cases – *Parris*, *Acbhita* and *Bougnaoui* - go against this trend as they limit the scope of protection provided.

a Parris v Trinity College Dublin

In *Parris*, the CJEU limited the scope provided by Directive 2000/78/EC by rejecting a claim for discrimination on a combination of grounds. Mr Parris, a former lecturer of Trinity College Dublin, claimed that the university discriminated against him on grounds of sexual orientation and age. The university's pension scheme provided for the payment of a survivor's pension to the spouse or civil partner of the pension scheme member as long as the marriage or civil partnership had been entered into before the member reached the age of 60. Although Mr Parris and his partner had been in a relationship for more than 30 years, they entered into a civil partnership in the UK in 2009 when Mr Parris was 63. This civil partnership could only be recognised in Ireland in 2011 when the Civil Partnership Act 2010 entered into force. This was just after Mr Parris had retired. Before he retired, he requested that, in the event of his death, the survivor's pension would be paid to his partner, but the university rejected this.

The CJEU held that there was no sexual orientation discrimination and no age discrimination. And, while recognising that discrimination may be based on several grounds, it held that no new category of discrimination could exist where discrimination on either one of the grounds had not been established (*Parris*, paras 80 and 81). The CJEU thus appears to have rejected a claim for multiple or intersectional discrimination, a claim based on a combination of discrimination grounds, if there is no discrimination on either of the individual grounds. This restricts the protection provided by the Directives, even though the Court itself accepts that discrimination can be based on more than one ground. In practice, this means that people who are discriminated against because of a combination of grounds could be left without a remedy, if they cannot prove discrimination on either one of the grounds, as was the case with Mr Parris. According to Trifonidou (2016), the decision 'demonstrates the ECJ's failure to accept the reality of multiple discrimination'. The case can thus be seen as a restriction on the protection against discrimination provided by the Directives. It is unfortunate that the CJEU did not follow the opinion of Advocate General Kokkott,²⁶ who concluded that there was indirect sexual orientation discrimination, as well as direct age

discrimination; and, she stressed that particular attention needed to be given to the fact that the discrimination was 'attributable to a combination of two factors, age and sexual orientation'; and, pointed out that 'the Court's judgment will reflect real life only if it duly analyses the combination of those two factors, rather than considering each of the factors of age and sexual orientation in isolation' (Opinion AG Kokott, *Parris*, para. 4). Kokott concluded that there was indirect discrimination on the combined grounds of sexual orientation and age, even if it turned out that discrimination on the ground of age alone or of sexual orientation alone was not present (Opinion AG Kokott, *Parris*, paras 147-159). The CJEU decision also goes against what the EU Commission stated in its 2014 report on the Directives, that 'the Directives already allow a combination of two or more grounds of discrimination to be tackled in the same situations' (COM (2014) 2, para. 4.4). By not following this or the opinion of the Advocate General, the CJEU has limited the protection provided against discrimination in EU law.

b Religion and belief: Achbita and Bougnaoui

The last two cases analysed here are *Achbita* and *Bougnaoui*.²⁷ Both concerned Muslim women who wanted to wear a headscarf to work and, when their employer asked them to remove the headscarf, they refused to do so and were dismissed. Ms Achbita was a receptionist working for G4S who was permanently contracted out to a third party. When she told her employer that she wanted to start wearing a Muslim headscarf at work, G4S said that this was against the rule that workers could not wear visible signs of their political, philosophical or religious beliefs in the workplace. The Belgian Court of Cassation asked the CJEU whether this rule constituted direct discrimination (*Achbita*, para. 21). Ms Bougnaoui worked as a design engineer for Micropole and she occasionally went out to work at customers' sites. She was asked to remove her headscarf after a customer's staff member complained about it. The French Court of Cassation asked the CJEU whether the wish of a customer no longer to have services provided by an employee wearing a headscarf, was a genuine and determining occupational requirement (*Bougnaoui*, para. 19).

The CJEU appears to send out mixed messages in these cases. On the one hand, it held that the term 'religion' must be interpreted broadly and accepted that the wearing of a Muslim headscarf fell within the scope of Directive 2000/78/EC (*Achbita*, para. 28; *Bougnaoui*, para. 30). The CJEU also held that the wish of a customer not to be served by someone in a headscarf was not a genuine and determining occupational requirement (*Bougnaoui*, paras 40-41). Article 4(1) Directive 2000/78/EC contains an exception for genuine and determining occupational requirements and determines that, whether such a requirement is present depends on the nature of the occupational activities and the context in which these are carried out; and, the occupational requirement must be proportionate to the legitimate aim pursued. In rejecting the wish of a customer as a genuine and determining occupational requirement, the CJEU followed its own settled case law that exceptions to the principle of equal treatment must be interpreted strictly.²⁸ According to Loenen (2017: 64), the decision that Article 4(1) Directive 2000/78/EC is not applicable, 'seems a convincing reasoning, as it appears hard to argue that the wearing of the headscarf interferes with the professional performance of Bougnaoui as an IT-engineer' (See also: Opinion AG Sharpston, *Bougnaoui*, para. 102).

Both the definition of religion or belief and the restrictive application of the occupational requirement expand the protection provided against religion or belief discrimination. However, other parts of the judgments can be seen as restricting this protection. In *Achbita*, the CJEU held that there was no direct discrimination because the internal rule referred 'to the wearing of visible signs of political, philosophical or religious beliefs' and thus covered 'any manifestation of such beliefs without distinction'. The rule was treating all workers the same and there was no evidence that the rule was applied differently to Ms Achbita (*Achbita*, paras 30-32). In *Bougnaoui*, the CJEU stated that it was not clear whether the referred question was based on a finding of a direct or indirect discrimination. It then went on to point out, as it had done in *Achbita* and with a reference to that case, that it was for the referring court to decide whether the dismissal was directly or indirectly discriminatory (*Bougnaoui*, paras 31-32).

There were different views of whether there was direct or indirect discrimination in this case, not only between the Advocate Generals, but also between the parties themselves, the Member States involved and between academic commentators (Howard, 2017: 351-354; Loenen, 2017: 63-65; Vickers 2017: 250). The question is important because, as was mentioned, direct discrimination cannot be justified, but indirect discrimination can. But, even if indirect discrimination is found rather than direct discrimination, the strictness of the application of the justification test can influence the outcome of the case.

Although it was held to be up to the national court to decide whether there was direct or indirect discrimination, the CJEU, in *Achbita*, gave guidance on how to deal with indirect discrimination. According to Article 2(2)(b)(i) Directive 2000/78/EC, indirect discrimination is not unlawful if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The CJEU held that a neutrality policy was a legitimate aim, as it was part of the freedom to conduct a business, guaranteed by Article 16 EUCFR (*Achbita*, paras 37-38).

In considering whether the ban was appropriate and necessary, the CJEU held that the ban on visible political, philosophical or religious symbols was justified as long as the ban was genuinely pursued in a consistent and systematic manner and thus did not make a distinction between different religions or different (religious, philosophical or political) beliefs; as long as the rule was limited to customer-facing employees; and, as long as the employer had considered whether the employee could be moved to a job without contact with customers (*Achbita*, paras 40-43).

The two judgments have come in for a lot of criticism (Bell, 2017; Brems, 2017; Howard, 2017; Jolly, 2017; Loenen 2017; Spaventa, 2017; Vickers 2017) which can be summarised under three main points. First of all, the CJEU's easy acceptance of neutrality as a legitimate aim which can justify indirect discrimination has been criticised because the CJEU does not really explain why neutrality must be considered a legitimate aim, especially as both cases concerned private employers. Brems (2017) sees the acceptance of the expansion of neutrality to the private sphere without the least degree of scrutiny as problematic and points out that 'neutrality can be an easy cover-up for

prejudice’ (See also, Howard, 2017: 355-356; Jolly, 2017: 311-312; Loenen, 2017: 65; Spaventa, 2017).

Secondly, there is criticism of the way in which the CJEU applies the proportionality and necessity test (Bell, 2017; Howard, 2017; Jolly, 2017; Loenen, 2017, Vickers, 2017). The CJEU does not appear to apply a very strict proportionality test and does not balance the needs of the employer with the disadvantage imposed on the individual employee or with that employee’s right to manifest their religion guaranteed by Article 10 EUCFR (Bell, 2017: 795; Howard, 2017: 358-359; Jolly 2017: 312). The CJEU held that the prohibition must be limited to what is strictly necessary and concluded that this would be the case if the ban was limited to employees who interact with customers (*Achbita*, para. 42). But was this really necessary to achieve the aim of neutrality? Advocate General Kokott stated that the neutrality rule was ‘essential to avoid the impression that external individuals might associate with G4S itself or with one of its customers, or even attribute to the latter, the political, philosophical or religious beliefs publicly expressed by an employee through her dress’ (Opinion, AG Kokott, para. 95). However, it can be questioned if this really happens in practice. Kokott did not bring forward or refer to any evidence for this (Howard, 2017: 356; Jolly 2017: 312-313). Loenen (2017: 67) points out that the condition that a neutrality policy needs to be limited to workers who interact with customers ‘still leaves a very large group of workers exposed to the negative effects of a ban on religious clothing or symbols’. And, according to Bell (2017: 796), ‘it would surely be firmly rejected if an employer sought to place other groups vulnerable to discrimination in job roles that avoided contact with customers’.

The other condition is that the employer should offer the employee a non-customer facing role, but only if this can be achieved taking into account the inherent constraints to which the undertaking is subject, and without the employer being required to take on an additional burden (*Achbita*, para. 43). Therefore, this requirement is not very onerous on the employer, especially not if compared with the duty of reasonable accommodation an employer has towards disabled people (Loenen, 2017: 67). With Vickers (2017: 252) we can conclude that confining protection for religious

expression to non-visible or back room roles does not promote equality for minority groups. The effect is to restrict not only employment opportunities but also broader inclusion, thereby creating invisibility for religious minorities (Vickers, 2017: 252).

The third major point of criticism is the uncertainty about the level of discretion left to the Member States to decide how to regulate the wearing of religious symbols in employment (Howard, 2017: 360-361; Loenen, 2017: 66-67; Vickers, 2017: 244-247, 249). Before the judgments and the opinions came out, Loenen and Vickers (2015: 170-177) discussed whether the CJEU should follow a deferential approach to national practice in relation to the wearing of religious symbols in employment or whether it should not do so and concluded that powerful arguments exist for both sides (see also: Loenen, 2012: 117-119). Advocate General Kokott favoured giving a measure of discretion to national authorities and courts in applying the proportionality test as she considered that the CJEU does not necessarily have to prescribe a solution that is uniform throughout the EU (Opinion AG Kokott, *Achbita*, para. 99). Jolly (2016: 677) points out that this 'has the effect of denoting religious discrimination among a hierarchy of protected characteristics'. According to Vickers (2017: 249), the CJEU 'generally upheld the use of national courts' discretion and concluded that religious dress at work could be fairly readily restricted'. Vickers (2017: 253) concludes that the CJEU 'failed to set clear and consistent standards across the various strands of equality law'.

The critical commentary on the cases suggests that the CJEU has placed religion or belief as discrimination ground close to the bottom of the hierarchy, just above age, as direct age discrimination can be justified when this is proportionate and necessary, while direct religion or belief discrimination can only be justified when there is a genuine and determining occupational requirement and the CJEU, in *Bougnaoui*, has interpreted this requirement strictly. However, the CJEU, in *Achbita* and *Bougnaoui*, has applied a rather more lenient justification test than it generally applies to justification of other grounds of discrimination. Loenen and Vickers (2015: 175) wrote before the judgments, that 'if the CJEU decides to take a deferential approach to equality when

religious issues are involved, then, it will effectively introduce a hierarchy as between equality rights' and this is what the CJEU appears to have done.

But why did the CJEU apply this more lenient justification test in relation to religion and belief? Political reasons might well play a role here. As Vickers (2017: 254) writes,

the reasons for the backwards steps in terms of equality [in Achbita and Bougnaoui] can best be understood in the context of a deeper reluctance on the part of the CJEU to address issues of state sovereignty which arise when considering the highly contentious question of the proper scope of protection for religion or belief in Europe.

Loenen (2017: 48) points to the widely diverging approaches to religion and belief across Europe and suggests that 'minimalism and ambiguity in the judgment provide a way to arrive at some sort of consensus that can be supported by the majority' (see also: Bell, 2017, 796). As was mentioned in the above, political expediency played a role in the fast adoption and the wide scope of Directive 2000/43/EC and the presence or lack of consensus regarding the legal recognition of same-sex partnerships/marriage has been mentioned in relation to the protection of same-sex couples.

However, there are dangers to applying a more lenient justification test and thus a more deferential approach in relation to indirect religion and belief discrimination. First, this would leave minority groups with less protection than majority groups and this leads not only to restricting their employment opportunities, but also their broader inclusion, as mentioned above (Loenen, 2015: 119; Vickers 2017: 251-252). As Jolly (2017: 313) points out: employees who want to wear religious symbols at work may face a stark choice: 'be pushed out of sight or lose your job'. This also goes against a number of social policy objectives of the EU, including the promotion of inclusion and integration and the free movement of workers (Loenen and Vickers, 2015: 173-174).

Moreover, applying a lenient justification test and applying a deferential approach which leaves discretion to the Member States may lead to 'widely diverging outcomes of transposing the equality directives in this area: they may come to mean entirely different things in different

countries' (Loenen, 2012: 119; Loenen and Vickers, 2015: 173). This goes against the fact that the CJEU generally aims at uniform application of EU law and at avoiding inconsistencies (Howard, 2017: 360; Loenen, 2012: 117).

Finally, it is not in line with the previous case law of the CJEU as the Court, as mentioned, has consistently held that exceptions to the principle of equal treatment must be interpreted strictly; and, the CJEU, in *Bilka Kaufhaus*, has also explained that the justification test for indirect sex discrimination has three parts: the means chosen must correspond to a real need; they must be appropriate to achieving the objective pursued and, they must be necessary to that end.²⁹ The application of the justification and proportionality test in *Achbita* and *Bougnaoui* can be criticised for not following any of these three requirements, as was mentioned above. A consequence of not following the CJEU case law in this also carries a risk of levelling down of protection: lowering the standards applied for one ground of discrimination might lead to a lowering of standards for other grounds as well (Loenen, 2012: 119; Howard, 2017: 361-362; Vickers, 2016).

The analysis of *Achbita* and *Bougnaoui* has shown that 'religious equality in the workplace across Europe is looking like a rather strange kind of equal' (Jolly (2017: 314) and that the CJEU has placed religion and belief close to age discrimination at the bottom of the hierarchy.

Conclusion

This article examined the hierarchy of discrimination grounds and the reasons behind it. It analysed a number of cases from the CJEU under Directives 2000/43/EC and 2000/78/EC and the influence of these cases on the development of the protection provided against discrimination. Sex discrimination was touched upon in relation to the hierarchy but was not further discussed as the focus here was on the grounds of discrimination which were not covered by EU anti-discrimination law until 2000. The argument was that the CJEU has generally given a purposive interpretation to the provisions and has expanded the protection against discrimination in many cases, although this is more extensive for some grounds of discrimination than for others. However, in three recent cases

the CJEU has given a rather narrow and restrictive interpretation and did not continue the trend of moving the protection forward that was present in the other cases.

Based on the analysis, the conclusion is that the CJEU case law has compounded the hierarchy of discrimination grounds. It has strengthened the position of racial and ethnic origin at the top of the hierarchy through *Feryn* and *CHEZ*. With its expansive interpretations of disability discrimination and reasonable accommodation for disabled people in *Ring and Werge*, it has also reinforced the position of disability in its second place in the hierarchy. The CJEU has expanded the protection against sexual orientation discrimination in some ways, but it has stopped short of pushing the Member States to create some form of legal recognition of same-sex partnerships. Whether the Court will change its position in the pending *Coman* case remains to be seen. If the CJEU follows Advocate General Whatelet's opinion, it will take a big step in that direction.

On the one hand, the CJEU judgments in *Achbita* and *Bougnaoui*, contain some positive aspects: the broad interpretation of 'religion'; the decision that the wish of a customer not to be served by someone in a headscarf was not a genuine and determining occupational requirement; and, the fact that the judgment has made clear that a ban on Muslim headscarves alone is unlawful. On the other hand, the judgments have placed religion close to the bottom of the hierarchy of discrimination grounds because the CJEU did not do a very rigorous justification test: it accepted that neutrality was a legitimate aim without much examination of this; it did not take account of the effects of a neutrality policy on the individual affected and their freedom to manifest their religion; and it did not really consider whether a ban on religious, philosophical or political symbols was really necessary to achieve the aim of neutrality. The CJEU also appears to have deferred to the Member States by leaving them some discretion, but it was rather vague in indicating how much discretion they have.

This article suggests that the reasons behind the reticence of the CJEU in relation to religion and belief and also in relation to the recognition of same-sex relationships are political. There is a lack of consensus in the Member States about the proper scope of protection for religion or belief

and about the legal recognition of same-sex relationships. It appears that the CJEU wants to tread carefully in such areas of contention and try and find a way of deciding these cases which can be supported by the majority of Member States. In view of the political sensitivity of these issues, the rather reticent approach of the CJEU is understandable.

However, the *Achbita* and *Bougnaoui* judgments put more obstacles in the way of religious minorities and hinder both their employment opportunities and their wider social inclusion and integration, which are part of EU policy. This could have a specifically detrimental effect on Muslim women who want to wear a headscarf in the workplace (Brems, 2017: Loenen, 2017: 67; Vickers, 2017: 253). These authors point to the potential intersectional discrimination in these cases, where both religious and sex discrimination interact. Unfortunately, the CJEU has rejected, in *Parris*, a claim on a combination of discrimination grounds where the claims on either of the separate grounds is unsuccessful so it is doubtful if a claim for discrimination on the combined grounds of religion and sex would succeed.

The overall conclusion of this article must be that EU law has created a hierarchy of discrimination grounds and that the protection against discrimination on some grounds is stronger than others. The case law of the CJEU has contributed to this hierarchy rather than challenging it and, in doing so, has, unfortunately, missed some great opportunities to contribute to a more coherent and sustainable regime of EU equality law.

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¹⁰ Victimisation: Article 9 Directive 2000/43/EC and Article 11 2000/78/EC.

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¹² Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, ECLI:EU:C:2015:480.

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¹⁴ See also: Benedi Lahuerta, 2016 and McCrudden, 2016. The latter points out the problems the expansion of discrimination by association to indirect discrimination could lead to.

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²⁵ Case C-673/16 *Coman and Others v Romania*, Opinion Advocate General Wathelet, ECLI:EU:C:2018:2, para. 77.

²⁶ C-443/15 *Parris v Trinity College Dublin*, Opinion Advocate General Kokott, ECLI:EU:C:2016:493, paras 110, 146 and 159.

²⁷ There were very divergent opinions in the two cases, see Opinion Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, EU:C:2016:382; Opinion Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, EU:C:2016:553. For an analysis of the cases, see: Bell, 2017; Howard, 2017; Loenen, 2017; Vickers, 2017.

²⁸ See for example, Case C-222/83 *Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, para. 36; Case C-273/97 *Sirdar v the Army Board and Secretary of State for Defence*, ECLI:EU:C:1999:523, para. 23; Case C-285/98 *Kreil v Bundesrepublik Germany*, ECLI:EU:C:2000:02, para. 20;

Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, ECLI:EU:C:2010:4, para. 60; Case C-447/09 *Prigge and Others v Deutsche Lufthansa AG*, ECLI: EU:C:2011:573, paras 56 and 72.

²⁹ Case C-170/84 *Bilka Kaufhaus v. Karin Weber von Harz*, EU:C:1986:204, para. 36. See also: *CHEZ*, Para. 118.